

# 3

## THE MAINE UNFAIR TRADE PRACTICES ACT

### § 3. Introduction

This consumer rights chapter describes Maine's most important consumer law, the Maine Unfair Trade Practices Act. It contains the following sections:

**§ 3. 1. The Maine Unfair Trade Practices Act**

**§ 3. 2. What Trade Practices Are Unfair?**

**§ 3. 3. What Trade Practices Are Deceptive?**

**§ 3. 4. Statutory Violations Of The Unfair Trade Practices Act**

**§ 3. 5. Sample UTPA Demand For Relief Letter**

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### § 3. 1. The Maine Unfair Trade Practices Act

The Maine Unfair Trade Practices Act (UTPA)<sup>1</sup> prohibits unfair and deceptive practices in trade or commerce. The Attorney General is charged with enforcing this law when he or she determines that an enforcement action would be in the public interest.<sup>2</sup>

In addition to the enforcement authority vested in the Attorney General, there is a private right of action for consumers,<sup>3</sup> but it is limited to consumer transactions that are “primarily for personal, family or household purposes.”<sup>4</sup> A consumer who suffers a loss as a result of a seller's use of an unfair or deceptive practice may bring an action in court<sup>5</sup> for actual damages, restitution and for other equitable

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<sup>1</sup>5 M.R.S. §§ 205-A - 214.

<sup>2</sup>5 M.R.S. § 209.

<sup>3</sup>5 M.R.S. § 213. While the UTPA is modeled on the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), there is no federal analog to the private right of action provision.

<sup>4</sup>5 M.R.S. § 213(1). See *Sanford v. National Ass'n for the Self Employed Inc.*, 640 F. Supp. 2d 82, 90 (D. Me. 2009) (self-employment and small business purposes are not subject to the UTPA); and *Enerconv. Global Computer Supplies, Inc.*, 675 F. Supp. 2d 188, 1983 (D. Me. 2009 ) (purchases primarily for resale are not subject to the UTPA). A business seeking to recover for deception in transactions should look at the Uniform Deceptive Trade Practices Act, 10 M.R.S. §§ 1211 through 1216.

<sup>5</sup> The action can be brought in District Court or Superior Court. There is a right to a jury trial in an action brought in Superior Court. 5 M.R.S. § 213(1).

relief, including an injunction, as the court determines necessary and proper.<sup>6</sup> Pursuant to the Maine Statute of Limitations, a private unfair trade practice court action must be commenced within 6 years of the UTPA violation.<sup>7</sup>

The private right of action provision is designed to encourage early settlement of disputes by requiring the consumer to give the seller a written demand for relief, describing the acts complained of and the losses claimed,<sup>8</sup> at least 30 days prior to filing the lawsuit.<sup>9</sup> It should be mailed or delivered to the seller at the seller's last known address, and be sure to keep a copy. Failure to give this written demand prior to filing suit could limit the consumer's right to attorney's fees and costs.<sup>10</sup>

The seller may make a written settlement offer in response to the demand, which the consumer can accept or decline. If the consumer files a lawsuit and prevails, the consumer may recover attorney's fees<sup>11</sup> and costs of suit.<sup>12</sup> However, if the consumer declines the seller's settlement offer and later obtains a judgment from the court that is less than the settlement offer, the consumer may not recover attorney's fees and costs incurred after the date the seller made his offer.<sup>13</sup>

## § 3.2. What Trade Practices Are Unfair?

The Maine Unfair Trade Practices Act is modeled in the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45(a)(1). Maine law provides that Maine courts are to be guided by the decisions of the federal courts and the FTC's decisions in determining whether an act or practice is unfair or deceptive.<sup>14</sup>

The Maine courts have adopted the FTC's three-part test for unfairness.<sup>15</sup> An act or practice will be found to be unfair if the following requirements are met:<sup>16</sup>

1. It must cause, or be likely to cause, substantial injury to consumers;<sup>17</sup>

<sup>6</sup> Loss of money or property is required to bring a private action under the UTPA. The statute does not allow for recovery based on pain, suffering, emotional distress, loss of time, etc. *In re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 613 F. Supp. 2d 108, 131-132 (D. Me. 2009).

<sup>7</sup> *McKinnon v. Honeywell Intern., Inc.*, 2009 ME 69, ¶¶ 9-16, 977 A.2d 420, 424-426.

<sup>8</sup> The notice must include a demand for monetary relief and identify any unfair trade practices or deceptive acts. The Court has found demands deficient in this regard in *Kilroy v. Northeast Sunspaces, Inc.*, 2007 ME 119, ¶ 13, 930 A.2d 1060, 1063, and *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267, 273 (Me. 1995).

<sup>9</sup> 5 M.R.S. § 213(1-A).

<sup>10</sup> Failure to give the section 213(1-A) written notice of claim is not a defense to the claim, but it may be raised as a defense to a claim for attorney's fees. It is appropriate to raise lack of notice in response to an attorney fee request as opposed to in the answer to the complaint. *Kilroy*, 2007 ME 119, ¶ 17, 930 A.2d at 1064. Moreover, lack of notice does not mandate that the court deny attorney fees. Rather, it is a factor that the court should take into consideration when exercising its discretion regarding the request for attorney fees and costs. *Id.* ¶ 18, 930 A.2d at 1064.

<sup>11</sup> Attorney fees under the UTPA are analyzed using the same methods as courts use in cases involving the federal civil rights attorney fee provision. *Advanced Construction Corp. v. Pilecki*, 2006 ME 84, ¶ 29, 901 A.2d 189, 199. The Law Court has upheld fee awards when the trial court apportioned the fee request between fee and non-fee claims. *Vanvoorhees v. Dodge*, 679 A.2d 1077, 1082 (Me. 1996). It has also upheld an attorney's fee award that was not apportioned between fee and non-fee claims. *William Mushero, Inc. v. Hull*, 667 A.2d 853, 855 (Me. 1995). In addition, the Law Court has modified an award of attorney's fees to delete time spent researching non-fee claims. *Beaulieu v. Dorsey*, 562 A.2d 678, 679 (Me. 1989).

<sup>12</sup> 5 M.R.S. § 213(2).

<sup>13</sup> 5 M.R.S. § 213(1-A). This portion of the statute is discussed in *Kilroy*, 2007 ME 119, ¶¶ 8-10, 930 A.2d at 1063.

<sup>14</sup> See 5 M.R.S. § 207(1).

<sup>15</sup> *State v. Weinschenk*, 2005 ME 28, ¶ 16, 868 A.2d 200, 206; *Tungate v. MacLean-Stevens Studios, Inc.*, 1998 ME 162, ¶ 9, 714 A.2d 792, 797.

<sup>16</sup> The sale of defectively constructed houses satisfies the requirements of the unfairness test. See *State v. Weinschenk*, 2005 ME 28, ¶ 16, 868 A.2d at 206.

<sup>17</sup> The purpose of the substantial injury requirement is to weed out speculative or trivial harms. *Tungate*, 714 A.2d at 792.

2. It must not be outweighed by countervailing benefits to consumers or competition; and
3. It must not be reasonably avoidable by consumers.

### **§ 3. 3. What Trade Practices Are Deceptive?**

An act or practice is deceptive if it is a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances.<sup>18</sup> “Materiality” involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.<sup>19</sup>

A trade practice may be deceptive, within the meaning of the UTPA *even if the defendant had no intent to deceive*.<sup>20</sup>

### **§ 3. 4. Statutory Violations Of The Unfair Trade Practices Act**

Often, when enacting a statute that prohibits a particular commercial practice, the Maine Legislature will expressly state that violation of that statute is a violation (or is *prima facie*, or presumptive, evidence of a violation) of the UTPA. Here are some examples:

- A. Automated Telephone Solicitations<sup>21</sup>
- B. Cable Television Service<sup>22</sup>
- C. Charitable Solicitations Act<sup>23</sup>
- D. Manufactured Housing Warranties<sup>24</sup>
- E. Leases (Landlord-Tenant)<sup>25</sup>
- F. Leases (Consumer Transactions)<sup>26</sup>
- G. Used Car Information<sup>27</sup>
- H. Insulation Contracts<sup>28</sup>
- I. Home Construction Contracts<sup>29</sup>
- J. Solar Energy Equipment Warranties<sup>30</sup>

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<sup>18</sup>*State v. Weinschenk*, 2005 ME 28, ¶ 17, 868 A.2d at 206.

<sup>19</sup>*Id.* (citing *Cliffdale Assocs., Inc.*, 103 F.T.C.110, 164 (1984)).

<sup>20</sup>*Bartner v. Carter*, 405 A.2d 194, 200 (Me. 1979); *Binette v. Dyer Library Ass’n*, 688 A.2d 898, 906-907 (Me. 1996) (a good faith withholding of known or even unknown material information may constitute an unfair or deceptive act); *Courtney v. Bassano*, 733 A.2d 973, 976 (Me. 1999) (antique dealer violated the UTPA by breaching express warranties, withholding information, and failing to provide refund).

<sup>21</sup>10 M.R.S. § 1498(8).

<sup>22</sup>30-A M.R.S. § 3010(7).

<sup>23</sup>9 M.R.S. § 5014.

<sup>24</sup>10 M.R.S. § 1406.

<sup>25</sup>14 M.R.S. § 6030.

<sup>26</sup>11 M.R.S. § 2-1104.

<sup>27</sup>10 M.R.S. § 1477.

<sup>28</sup>10 M.R.S. § 1483.

<sup>29</sup>10 M.R.S. § 1490(1).

<sup>30</sup>10 M.R.S. § 1494.

- K. Implied Warranties for Consumer Goods<sup>31</sup>
- L. Pyramid Clubs<sup>32</sup>
- M. Odometers<sup>33</sup>
- N. Law Enforcement Solicitations<sup>34</sup>
- O. Unsolicited Telefacsimile Transmissions<sup>35</sup>
- P. Motor Vehicle Dealers<sup>36</sup>
- Q. Motor Vehicle Repairs<sup>37</sup>
- R. Mobile Home Parks<sup>38</sup>
- S. Pawnshop Transactions<sup>39</sup>
- T. Hearing Aid Dealers and Fitters<sup>40</sup>
- U. Consumer Solicitation Sales<sup>41</sup>
- V. Door-to-Door Home Repair Transient Sellers<sup>42</sup>
- W. Transient Sellers of Consumer Merchandise<sup>43</sup>
- X. Business Opportunities Sales<sup>44</sup>
- Y. Membership Camping<sup>45</sup>
- Z. Time Shares<sup>46</sup>
- AA. New Car Lemon Law<sup>47</sup>
- BB. Charges After Free Trial Period<sup>48</sup>
- CC. Immigration and Nationality Law Assistance Act<sup>49</sup>
- DD. Maine Self-service Storage Act<sup>50</sup>

The Attorney General can also issue legally enforceable *Rules* that define unfair and deceptive trade practices.<sup>51</sup> The Attorney General has issued rules regulating Lemon Law arbitration (*see* Chapter

<sup>31</sup> 11 M.R.S. § 2-316(5)(a).

<sup>32</sup> 17 M.R.S. § 2305.

<sup>33</sup> 29-A M.R.S. § 752.

<sup>34</sup> 25 M.R.S. § 3702-C.

<sup>35</sup> 10 M.R.S. § 1496(4).

<sup>36</sup> 29-A M.R.S. § 1754(3).

<sup>37</sup> 29-A M.R.S. § 1807.

<sup>38</sup> 10 M.R.S. § 9100.

<sup>39</sup> 30-A M.R.S. § 3963(6).

<sup>40</sup> 32 M.R.S. § 17305.

<sup>41</sup> 32 M.R.S. § 4670.

<sup>42</sup> 32 M.R.S. § 14512.

<sup>43</sup> 32 M.R.S. § 14713.

<sup>44</sup> 32 M.R.S. § 4700(1).

<sup>45</sup> 33 M.R.S. § 589-C(1).

<sup>46</sup> 33 M.R.S. § 592(6).

<sup>47</sup> 10 M.R.S. § 1169(10).

<sup>48</sup> 10 M.R.S. § 1210-A.

<sup>49</sup> 4 M.R.S. § 807-B.

<sup>50</sup> 10 M.R.S. § 1377.

<sup>51</sup> 5 M.R.S. § 207(2). Legislatively authorized Rules have the force of law.

7 of this Guide), the sale of home heating oil (*see* Chapter 19 of this Guide) and dealer advertising of motor vehicles (*see* Chapter 8 of this Guide). *See also* the Secretary of State's Rules dealing with window stickers when selling used cars (*see* Chapter 9 of this Guide).

## **§ 3. 5. Sample UTPA Demand For Relief Letter**

Date

Name of Seller  
Seller's Address

Dear Seller:

Under the provisions of the Maine Unfair Trade Practices Act, 5 M.R.S. § 213, I hereby make written demand for relief as outlined in that statute.

On or about [date], the following unfair or deceptive act occurred:

[Explain what happened.]

I believe your actions in this matter violate the Maine Unfair Trade Practices Act, 5 M.R.S. § 207. As a result of this unfair or deceptive act or practice, I suffered loss of money or property as follows:

[Indicate money or property (real or personal) loss.]

Therefore, I hereby demand the following relief:

[Indicate the relief, or payment for damages, which you seek.]

The Maine Unfair Trade Practices Act gives you the opportunity to make a good faith written offer of settlement in response to this letter within 30 days. Your failure to do so could subject you to a judgment for actual damages, restitution, an injunction, attorney's fee and costs if I file a lawsuit.

Sincerely,

Your name  
Your address  
Your telephone number

## **§ 3. 6. Sample UTPA Superior Court Complaint**

WILLIAM C. KIRBY, [Consumer]

Plaintiff,

vs.

**COMPLAINT**

JOHN D. HARWOOD,  
d/b/a HARWOOD & SON CONSTRUCTION, [Seller]

Defendant

### **INTRODUCTION**

1. This is an action brought by Plaintiff against Defendant under the Maine Unfair Trade Practices Act, 5 M.R.S. §§ 205-A – 214, and the statute governing Maine Home Construction Contracts, 10 M.R.S. §§ 1486 – 1490.

### **PARTIES**

2. Plaintiff is a resident of Fairmount, Maine.

3. Defendant is also a resident of Fairmount, Maine, and was at all material times, engaged in the business of providing residential construction and maintenance services to consumers. His business address is 123 Easy Street, Suite A, Fairmount, ME 04846.

### **JURISDICTION**

4. This Court has jurisdiction over this action pursuant to 4 M.R.S. § 105 and 5 M.R.S. § 213, and personal jurisdiction over the parties.

### **STATUTORY BACKGROUND**

5. Pursuant to 5 M.R.S. § 207, “unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful.”

6. Pursuant to 5 M.R.S. § 213(1), any consumer who purchases goods or services for personal, family or household purposes from a person whose unfair or deceptive trade practices cause

any loss of money or property to the consumer may bring an action in Superior Court or District Court for actual damages, attorney's fees and costs, restitution and for such other equitable relief as the court deems necessary and proper.

7. Pursuant to 10 M.R.S. § 1487, home construction contracts for more than \$3,000 in materials or labor must be in writing, and must contain the provisions that are set forth in the statute. A "home construction contract" is defined by 10 M.R.S. § 1486(4) as a contract to build, remodel or repair a residence, but includes a contract for "nonstructural" work such as electrical, plumbing, heating, carpeting, and window replacements.

8. Pursuant to 10 M.R.S. § 1487(5), a down payment for a home construction contract is limited to no more than one-third of the total contract price.

9. Pursuant to 10 M.R.S. § 1487(7), a home construction contractor warrants that "the work will be free from faulty materials; constructed according to the standards of the building code applicable for this location; constructed in a skillful manner and fit for habitation or appropriate use."

10. Pursuant to 10 M.R.S. § 1490, any violation of the chapter governing home construction contracts constitutes *prima facie* evidence of a violation of the UTPA.

### FACTS

11. Defendant is a home construction contractor in the business of providing residential construction and maintenance services to consumers.

12. Plaintiff hired Defendant on March 4, 2013 to renovate an upstairs bathroom in his home. The renovation included replacing the sink, toilet, and tub, tiling the floor, replacing all electrical fixtures and ventilation fan, and installing new sheetrock on the walls and ceiling, and then painting those surfaces.

13. Defendant told Plaintiff that he was an "expert craftsman," and that he would begin the job immediately and finish within two weeks.

14. At Defendant's request, Plaintiff paid him a down payment of \$7,250, which was one-



half of the total price quoted by Defendant.

15. Defendant did not give Plaintiff a written contract.

16. Defendant did not start the job for over a month, despite repeated excuses and assurances that he would be there “the next day.”

17. When Defendant last worked at Plaintiff’s home on May 20, 2013, the job was still substantially incomplete, and some of the work was poorly done.

18. Plaintiff has repeatedly tried to contact Defendant about correcting his work and finishing the job, but he refuses to answer or return Plaintiff’s calls.

19. Plaintiff finally hired another contractor to correct Defendant’s work and finish the job, at a cost of \$15,350.

**CAUSE OF ACTION  
(Home Construction Contract and Unfair Trade Practices Violations)**

20. Plaintiff hereby incorporates by reference each of the preceding paragraphs as though fully set forth herein.

21. Defendant has violated the requirements of 10 M.R.S. § 1487 for home construction contracts by failing to provide Plaintiff with a written home construction contract, obtaining a down payment of more than one-third of the agreed-upon price, failing to correct his poorly done work, and failing to complete the job when promised.

22. Pursuant to 10 M.R.S. § 1490, a violation of § 1487 constitutes *prima facie* evidence of a violation of 5 M.R.S. § 207.

23. Defendant has also violated 5 M.R.S. § 207 by misrepresenting to Plaintiff that he was an “expert craftsman” when his work is of poor quality, and that he would begin and finish the job within two weeks from the date he was hired.

24. Defendant’s violations of 5 M.R.S. § 207 have caused financial loss to Plaintiff.

25. At least 30 days prior to filing this action, Plaintiff gave Defendant a written demand for relief, a copy of which is attached to this Complaint as Exhibit A.

26. Defendant did not respond to Plaintiff's demand for relief.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment as follows:

- A. Actual damages of \$15,350;
- B. Costs and disbursements incurred by Plaintiff in connection with this action;
- C. Plaintiff's attorneys fees and costs of suit; and
- D. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated:

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William C. Kirby, Plaintiff  
Address  
Telephone Number